LIBRARY
SUPREME COURT U.S.

Office-Supreme Court, U.S.
FILED
MAR 22 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] //

NICO JACOBELLIS,
*Defendant-Appellant,*

*against*

STATE OF OHIO,
*Plaintiff-Appellee.*

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO*

## REPLY BRIEF

EPHRAIM LONDON,
*Attorney for Appellant,*
1 East 44th Street;
New York 17, N. Y.

On the Brief,
EPHRAIM LONDON
BENNET KLEINMAN
MARTIN GARBUS

# TABLE OF CONTENTS.


PAGE

The Court is requested to disregard the matter set out in Appendices 12, 14, 15, 16, 17, 18 and 19 to the Appellee's brief ..... 1

In answer to the Appellee's contentions (in Point I of its brief): (1) that there is no conflict between §2905.34 of the Ohio Revised Code as construed when Appellant was convicted and the statute as it was construed when Appellant's conviction was affirmed: and (2) that Appellant was benefited and not prejudiced by the change in the interpretation of the law ..... 3

The question (discussed in Point II of appellant's brief) of whether §2905.34 on its face abridges the freedom of the press, is presented in the jurisdictional statement and is properly before the Court ..... 7

The Appellee's contention, that the Court below was not given an opportunity to pass on the claim that "The Lovers" is not obscene (judged in accordance with constitutional standards) is untenable ..... 9

## Table of Cases.


| | PAGE |
|---|---|
| *Commissioner* v. *Wilcox* (1946) 327 U. S. 404 | 5, 6 |
| *Dewey* v. *Des Moines* (1899) 173 U. S. 193 | 8 |
| *James* v. *United States* (1961) 366 U. S. 213 | 5, 7 |
| *Market St. R. Co.* v. *Railroad Com. of Cal.* (1944) 324 U. S. 548 | 9 |
| *Raley* v. *Ohio* (1959) 360 U. S. 423 | 10 |
| *Roth* v. *United States* (1957) 354 U. S. 476 | 10 |
| *Screws* v. *United States* (1945) 325 U. S. 91 | 4, 5 |
| *Smith* v. *California* (1959) 361 U. S. 147 | 10 |
| *State* v. *Mapp* (1960) 170 Ohio St. 427, 166 N. E. 2d 387 | 3, 7 |
| *Teamster's Union* v. *Lucas Flour Co.* (1961) 369 U. S. 95 | 9 |
| *Tuck* v. *Chapple* (1926) 114 O. S. 155, 151 N. E. 48 | 9 |
| *Whitfield* v. *Ohio* (1936) 297 U. S. 431 | 10 |
| *Winters* v. *New York* (1948) 333 U. S. 507 | 7 |
| *Zenith International Film Corp.* v. *City of Chicago* (1960) 183 F. Supp. 623 (D. C. Ill.) | 1 |
| *Zenith International Film Corp.* v. *City of Chicago* (1961) 291 F. 2d 785 (7th Cir.) | 1, 2 |


## Table of Other Authorities.


| | |
|---|---|
| Canons of Professional Ethics, American Bar Association, October, 1948 | 2 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

---

**No. 164**

---

NICO JACOBELLIS,

Defendant-Appellant,

*against*

STATE OF OHIO,

Plaintiff-Appellee.

---

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO*

---

## REPLY BRIEF

**The Court is requested to disregard the matter set out in Appendices 12, 14, 15, 16, 17, 18 and 19 to the Appellee's brief.**

Appendix 12 to the Appellee's brief contains a part of the opinion of the Court in *Zenith International Film Corp.* v. *City of Chicago* (1960), 183 F. Supp. 623 (D. C. Ill.), The case is also cited in the Appellee's brief (at p. 4). It is cited by the Appellee as authority supporting its contention that "The Lovers", the film involved in this case, is obscene. There is no reference, in the Appellee's brief, to the fact that the case was reversed on appeal in *Zenith International Film Corp.* v. *City of Chicago* (1961) 291 F.

2d 785 (7th Cir.). The ground for reversal was that the Chicago Film Board had not accorded the owner of the film a full and fair hearing in judging "The Lovers" obscene. 291 F. 2d at 790. When the matter was remanded, the Chicago Board found that the film is not obscene, and in August 1961 issued a permit for its exhibition.* Under the circumstances the part of the opinion reprinted in Appellee's Appendix 12 should not be given consideration.

Appendices 14, 15, 16, 17, 18 and 19 to Appellee's brief are copies of the State's proposed exhibits, four of which were merely marked for identification on the trial of the case against Jacobellis, and all of which were withdrawn from the record during the trial, on the State's own motion (p. 1178, typewritten trial record). In the body of its answering brief the Appellee refers to four of those appendices as support for its statement of the facts of the case (Appellee's brief p. 2). The attorney for the State of Ohio is aware that the material is not properly before the Court. When the printed record on this appeal was being prepared by the Deputy Clerk of this Court, a question was raised with respect to the inclusion of Exhibit 8A (Appendix 18). The State's attorney agreed that the Exhibit, having been withdrawn, should not be included in the printing.

---

*The Appellant's attorney had been advised that the case he presented as authority had been overruled. He was also aware that the film was finally found not obscene by the responsible administrative agency in the case. Both facts were called to his attention before the Appellee's brief was prepared. Canon 22 of the Canons of Professional Ethics provides "It is not candid or fair for the lawyer * * * with knowledge of its invalidity, to cite as authority a decision that has been overruled * * * These and all kindred practises are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of Justice." Canons of Professional Ethics, American Bar Association, October, 1948.

**In answer to the Appellee's contentions (in Point I of its brief): (1) that there is no conflict between §2905.34 of the Ohio Revised Code as construed when Appellant was convicted and the statute as it was construed when Appellant's conviction was affirmed; and (2) that Appellant was benefited and not prejudiced by the change in the interpretation of the law.**

The State of Ohio concedes (at page 7 of its brief) that at the time of the Appellant-Jacobellis' trial "the authoritative interpretation" of §2905.34 was set forth in *State* v. *Mapp,* 170 Ohio St. 427, and that the trial court followed that construction. It will be recalled that in *State* v. *Mapp* the Ohio Supreme Court held that it was not necessary to show illicit purpose in order to convict one of violating §2905.34 of the Ohio Revised Code. On the appeal from Jacobellis' conviction the Ohio Supreme Court held, in the syllabus written by the Court, that both *scienter* and *mens rea* (guilty purpose) "must be established by proper evidence to sustain a conviction for violation of such section." (R. 511, *State* v. *Jacobellis,* 173 Ohio St. 22.)

The Appellee argues that the different interpretations of the statute in the *Mapp* and *Jacobellis* opinions are not in conflict; for, it reasons, the Ohio Supreme Court in ruling, in *Mapp,* that the proscribed conduct was punishable despite the absence of culpable intent, did not bar punishment of the same conduct done with wrongful intent (Appellee's brief pp. 7-9).

We cannot agree that the Ohio Court's ruling in *State* v. *Mapp,* 170 Ohio St. 427, that Section 2905.34 of the Ohio Revised Code *does not* require a showing of wrongful purpose, is consistent with its later determination that the same statute *does* require a showing of "a guilty

or wrongful purpose". (*State* v. *Jacobellis*, 173 Ohio St. 22 at p. 27).

The Appellee also argues that Jacobellis was not prejudiced, but was aided by the changed construction of the statute adopted in the opinion affirming his conviction (*State* v. *Jacobellis*, 173 Ohio St. 22), for under that interpretation the State was required to prove an additional element, namely guilty purpose, in order to convict one of violating the statute (Appellee's brief pp. 8-9).

The State's argument that Jacobellis was benefited by the requirement that another element be proved to obtain a conviction under the statute, fails to take account of the fact that the element of intent was not added until after Jacobellis' conviction.

The prejudice resulting from the affirmance of Jacobellis' conviction under a changed construction of the law was the denial to him of a trial under the law, or version of the law, held to justify his conviction. If, as the Ohio Supreme Court ruled, Section 2905.34 as applied to the indictment against Jacobellis, required proof of illicit purpose, he was entitled to be tried under that interpretation. The trial court, clearly, followed a different construction of the law (R. 12). Even if Jacobellis had, as the Appellee claims, acted wilfully in the belief that his conduct violated the law*, he was nevertheless entitled to a trial according to the law as the Ohio Supreme Court construed it in his case.

In *Screws* v. *United States* (1945) 325 U. S. 91 the petitioners were convicted of violating the Civil Rights Law. The trial court did not charge the Jury that the statute required a showing of wrongful intent on the part of the

* It may be noted, though not relevant to the discussion, that the evidence was to the contrary.

accused, and it does not appear that the statute had, before the *Screws* case, been construed to require the showing of wrongful intent. To immunize the statute against attack on the ground that it was unconstitutionally vague, this Court on reviewing Screws' conviction, interpreted the statute to require a showing of "bad purpose". 325 U. S. at pp. 103-104.* Though the validity of the governing statute was reaffirmed in *Screws* v. *United States* (1945) 325 U. S. 91, the defendant-petitioner's conviction was set aside, for the triers of the facts in the case had not been properly instructed with respect to the applicable law. The Government claimed in *Screws* (with justification in that case) that even though the jury had not been advised that such proof was necessary, the requisite evil intent on the part of the defendants had been fully proved at the trial. The Court found that the defendants' probable guilt of wrongful purpose did not alter the fact that they were entitled to be, and they had not been, judged by persons who were correctly informed with respect to the requirements of the statute before they found the defendants guilty of violating it. *Screws* v. *United States* (1945) 325 U. S. at pp. 106-7.

*James* v. *United States* (1961) 366 U. S. 213 presents a situation analogous to the one in the instant case. In that case the defendant was charged, under a penal provision of the Internal Revenue Code, and was convicted, of the crime of tax evasion, because he failed to report and pay an income tax on money that he had embezzled. Before the alleged crime was committed, the Court ruled in *Commissioner* v. *Wilcox* (1946) 327 U. S. 404, that embezzled funds

* We refer to the prevailing opinion in the case written by Mr. Justice Douglas and concurred in by three other members of the Court.

did not constitute taxable income. The doctrine of the *Wilcox* case was controlling at the time the defendant James was tried. This Court, on reviewing the case, overruled the *Wilcox* decision and held that embezzled funds were taxable income and that the failure to report and pay a tax on such funds should be held criminal. The majority of the Court agreed that, under the circumstances, the conviction of the defendant James should be reversed but disagreed with respect to whether the indictment should be dismissed or a new trial of the Defendant ordered. Mr. Chief Justice Warren, in an opinion in which Mr. Justice Brennan and Mr. Justice Stewart concurred, expressed the view that the changed interpretation of the penal law could only be given prospective effect, and that the Defendant James should not be retried, for he could not be guilty of willful violation of a statute if the alleged offense was not, at the time it was committed, within the purview of the law.* "We believe" Mr. Justice Warren wrote, "that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed. Therefore, we feel

---

* Mr. Justice Harlan in an opinion in which Mr. Justice Frankfurter joined, voted to overrule *Wilcox*, to reverse the defendant's conviction and to remand the case for a new trial. The defendant had been tried by a District Court Judge, without a jury. Although there was sufficient evidence to justify the opinion that the defendant had not relied on the interpretation of the statute in *Wilcox*, and had wilfully violated the penal statute (366 U. S. at p. 241, opinion of Mr. Justice Clark) Justices Harlan and Frankfurter believed a new trial was appropriate because of "the failure of the trial court, as trier of the facts, to consider whether misapprehension may have existed in the mind of the petitioner as to the applicable law, in determining whether the Government had proved that petitioner's conduct had been willful as required by the statute." 366 U. S. at p. 248.

that petitioner's conviction may not stand and that the indictment against him must be dismissed." (366 U. S. at pp. 221-2).

In the case at bar the scope of the penal statute was not limited in its application by reason of the controlling interpretation of the statute when the Appellant was tried (as in *James*), but the statute as then construed, violated the Federal constitution and was of no effect. (See discussion at pp. 17-21, 24 of Appellant's main brief.) The interpretation of the statute in *State* v. *Mapp*, 170 Ohio St. 427 was then as much part of the statute "as if it had been so amended by the legislature" *Winters* v. *New York* (1948) 333 U. S. 507, 514. The subsequent reinterpretation, given to save the statute, could not make felonious an act that was not in violation of any valid law at the time it was committed.

**The question (discussed in Point II of appellant's brief) of whether §2905.34 on its face abridges the freedom of the press, is presented in the jurisdictional statement and is properly before the Court.**

The State of Ohio objects to the Court's consideration of invalidity of the statute on its face. It contends the question was not presented in Appellant's Jurisdictional Statement, and to prove the omission, the Appellee's brief purports to summarize the questions that were raised in the Jurisdictional Statement. The following is from the Appellee's summary (at page 12 of its brief):

> "Question Nos. (1) (2) and (6) present questions concerning 'Section 2905.34 of the Revised Code * * * *as applied in this case*' " (matter omitted and emphasis as in Appellee's brief).

There is a vital omission in the Appellee's summary of the question (6)*. While it is technically true that the questions 1, 2 and 6 raise issues concerning §2905.34 *as applied*, question 6 of Appellant's Jurisdictional Statement also raises the question:

> "*Whether Section 2905.34 of the Ohio Revised Code on its face* and as construed and applied in this case *infringes the right of communication protected by the First and Fourteenth Amendments . . .*" (emphasis added)**.

In the discussion of the invalidity of §2905.34 on its face, it is shown, in Appellant's main brief, that there are a number of patently discriminatory exceptions to and exemptions from the statute, and it is submitted that the section contravenes the equal protection clause of the Fourteenth Amendment. The State of Ohio contends (at pages 16-17 of its brief) that the Appellant may not challenge the constitutionality of §2905.34 on the ground that it is discriminatory and denies equal protection of the laws, because the question was allegedly not raised in Appellant's Notice of Appeal. It is, of course, unnecessary to set forth in the notice of appeal each ground that Appellant intends to assert in support of his position on the principal question, *Dewey* v. *Des Moines* (1899) 173 U. S. 193, 197-8. Moreover, the question was presented in Appellant's Notice of Appeal.*** (see footnote page 9)

---

* Distorting the language or argument of opposing counsel (whether the distortion is by omission or misquotation) is also condemned by Canon 22 of the Canons of Professional Ethics.

** The question is not expressed in the terms and circumstances of the case since it relates to the validity of the statute apart from its application in the case.

**The Appellee's contention, that the Court below was not given an opportunity to pass on the claim that "The Lovers" is not obscene (judged in accordance with constitutional standards) is untenable.**

The Appellee objects to a consideration of the question discussed in Point III of Appellant's brief on the ground that the Appellant Jacobellis did not ask the Ohio Supreme Court to reconsider its judgment. Appellee's brief indicates (at p. 24) that Ohio law permits an application for rehearing, that Jacobellis' attorney wrote a letter stating that he intended to petition for rehearing and that he thereafter advised the Ohio Court that he did not intend to do so. The Appellee concludes that because Jacobellis did not ask for a rehearing, the Ohio Supreme Court was not given an opportunity to pass on the claim that its judgment with respect to the film was erroneous (Appellee's brief p. 25).

The Appellee's objection is untenable. One is not required to petition for a rehearing by the State Court, where the granting of rehearing is discretionary, as it is in Ohio, *Market St. R. Co.* v. *Railroad Com. of Cal.* (1944) 324 U. S. 548; *Teamsters Union* v. *Lucas Flour Co.* (1961) 369 U. S. 95, 101; *Tuck* v. *Chapple* (1926) 114 O. S. 155, 151 N. E. 48. In *Market St. R. Co.* v. *Railroad Com. of Cal.* (1944) 324 U. S. 548, this Court said of the right of a State Court to reconsider its judgment upon petition for rehearing (at pp. 551-2) "Such latent powers of the State Courts

* * * Notice of Appeal. "The following questions are presented by this appeal

"3. Whether Appellant was deprived of the right of communication, and of equal protection of the laws, . . . in violation of the First . . . and Fourteenth Amendments to the Constitution . . . , the Appellant having been convicted of possessing and also of exhibiting a motion picture entitled "The Lovers", . . . which film was judged obscene . . . in accordance with stricter standards than are applied to other publications" (R. 521-2).

over their judgments are too variable and indeterminate to serve as tests of our jurisdiction."

The federal question under discussion is, simply, whether the film "The Lovers" is obscene. The conviction of a person for exhibiting an allegedly obscene film is an infringement of the freedom of the press, if the film is not obscene within the definition outlined in *Roth* v. *United States* (1957) 354 U. S. 476. See *Smith* v. *California* (1959) 361 U. S. 147, 152. Since the federal question involves the judgment made by the Ohio Supreme Court it obviously cannot be said that the Court did not pass upon the question. *Whitfield* v. *Ohio* (1936) 297 U. S. 431, 436.

The Appellee also states (at page 25 of its brief) that the issue discussed in Point III of Appellant's main brief is not properly before the Court because it was not raised by Jacobellis in any of the Ohio Courts. The Appellee's statement, that the issue was not raised in any of the Courts below, is irrelevant, and it is factually incorrect. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio* (1959) 360 U. S. 423, 436. The issue was raised in Jacobellis' brief in the Supreme Court of Ohio, and in his brief in the Ohio Court of Appeals for Cuyahoga County; and every witness called by the Appellant at his trial gave testimony to show that the film is not obscene, judged in accordance with the standards prescribed by this Court.

Respectfully submitted,

EPHRAIM LONDON
Attorney for Appellant

*On The Brief*
EPHRAIM LONDON
BENNET KLEINMAN
MARTIN GARBUS